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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BEVERLY HILLS RESDENTIAL-BUSINESS ALLIANCE FOR A LIVABLE COMMUNITY, Plaintiff and Appellant, v. THE CITY OF BEVERLY HILLS et al., Defendants and Respondents; BEVERLY HILLS LUXURY HOTEL et al., Real Parties in Interest and Respondents.	B183973 (Los Angeles County Super. Ct. No. BS092135)

APPEAL from a judgment of the Superior Court of Los Angeles County, David P. Yaffe, Judge. Affirmed.

The Silverstein Law Firm, Robert P. Silverstein for Plaintiff and Appellant.

Laurence S. Wiener, City Attorney for Beverly Hills; Richards, Watson & Gershon, Mitchell E. Abbott, Ginetta L. Giovinco, for Defendants and Respondents.

O'Melveny & Myers, Brian S. Currey, David A. Lash, and Jennifer R. Szoke; Ervin, Cohen & Jessup, and Allan B. Cooper, for Real Parties in Interest and Respondents.

I. INTRODUCTION

This appeal concerns an environmental impact report prepared for purposes of compliance with the California Environmental Quality Act, Public Resources Code section 21000 et seq. (CEQA).[1] Plaintiff, Beverly Hills Residential-Business Alliance for a Livable Community, appeals from a May 26, 2005 judgment denying its consolidated writ petitions challenging certification of the environmental impact report. The judgment is in favor of defendants, the City of Beverly Hills, the City Council of the City of Beverly Hills, and the Parking Authority of the City of Beverly Hills, and real parties in interest, Beverly Hills Luxury Hotel LLC, and Athens Beverly Hills LLC. The project in question—the Beverly Hills Gardens and Montage Hotel Project—is a joint public and private venture consisting of a multi-story hotel with more than 200 guestrooms, up to 25 condominiums, a separate 3-story building for residential and commercial use, a public garden, and a 4-level subterranean garage. The project would occupy two and a half acres in the heart of the city's business district. The trial court found plaintiff's challenges to the environmental impact report were without merit. No prejudicial abuse of discretion occurred and we affirm the judgment.

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[1] Unless otherwise indicated, all further statutory references are to the Public Resources Code.

II. BACKGROUND

The joint public and private project was the subject of an initial November 8, 2001 memorandum of understanding. On November 18, 2002, a second memorandum of understanding was entered into and approved by the city. Project and environmental assessment applications were filed on December 10, 2002. A notice of intention to prepare an environmental impact report was issued on January 31, 2003. The draft environmental impact report was circulated for public comment on November 14, 2003. Six planning commission hearings were held between October 2003 and April 2004. A supplemental draft environmental impact report was circulated on May 14, 2004. Five city council hearings were held in July 2004. On July 28, 2004, the city council approved resolutions amending the city's general plan, specifically the land use map, to redesignate the project location from low-density commercial to the project's specific plan, adopting the specific plan, and certifying the final environmental impact report.

III. DISCUSSION

Plaintiff contends it was an abuse of discretion to certify the environmental impact report in that: it disregarded the cumulative impact of uses on adjacent parcels; its traffic analysis was distorted; the city concealed the need for and effect of a general plan amendment, resulting in "an impermissible change in the project description, and the lack of any meaningful analysis of the extent to which the [project's] height and density-violating precedent would have growth inducing impacts"; and it failed to adequately analyze air quality effects.

A. Standard of Review

The Supreme Court has held: "In reviewing agency actions under CEQA, . . . section 21168.5 provides that a court's inquiry 'shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.' Thus, the reviewing court '"does not pass upon the correctness of the [environmental impact report's] environmental conclusions, but only upon its sufficiency as an informative document."' [Citations.] [A reviewing court] may not set aside an agency's approval of an [environmental impact report] on the ground that an opposite conclusion would have been equally or more reasonable. '[The court's] limited function is consistent with the principle that "[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations."' [Citations.]" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; accord *Friends of Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 867.) "Substantial evidence" is defined in the CEQA Guidelines[2] as, "[E]nough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a).) The Supreme Court has further held that although CEQA requirements must be enforced, the reviewing court may not substitute its judgment for that of the people and its local representatives. (*Citizens of Goleta Valley v. Board of Supervisors*, *supra,* 52 Cal.3d a p. 564; *Napa Citizens for*

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[2] All references to Guidelines are to the "Guidelines for Implementation of the California Environmental Quality Act," California Code of Regulations, title 14, section 15000 et seq.

Honest Government v. Napa County Bd. of Supervisors (2001) 91 Cal.App.4th 342, 357.) It is the plaintiff's burden to show a prejudicial abuse of discretion. (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 139; *State of California v. Superior Court* (1990) 222 Cal.App.3d 1416, 1419.)

B. Cumulative Impacts

Plaintiff asserts the city ignored the cumulative impacts (primarily traffic issues) of uses on adjacent parcels. We find substantial evidence in the administrative record supported the city's conclusion the uses in question were not reasonably foreseeable probable future projects. An environmental impact report must consider a project's significant cumulative impact on the environment. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 394; § 21083, subd. (b)(2); Guidelines, § 15130, subd. (a).) Cumulative effect is defined in the Guidelines as follows: "'Cumulative impacts' refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. [¶] (a) The individual effects may be changes resulting from a single project or a number of separate projects. [¶] (b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and *reasonably foreseeable probable future projects*. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." (Guidelines, § 15355, italics added; *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 625.) Guidelines section 15130 states: "An [environmental impact report] shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable . . . . [¶] . . . [A] cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the [environmental impact report] together with other projects causing

related impacts." (Guidelines, § 15130, subd. (a)(1); *Bakersfield Citizens For Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214.) An impact is "cumulatively considerable" when the incremental impact of an individual project is significant when viewed in connection with the effects of past, other current, and effects of probable future projects. (Guidelines, § 15065, subd. (a)(3); *Communities For A Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 114-116.) The need to consider the environmental impact of a probable future project stems from the fact that, as the Court of Appeal has held: "[C]onsideration of the effects of a project or projects as if no others existed would encourage the piecemeal approval of several projects that, taken together, could overwhelm the natural environment and disastrously overburden the manmade infrastructure and vital community services. This would effectively defeat CEQA's mandate to review the actual effect of the projects upon the environment." (*Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles* (1986) 177 Cal.App.3d 300, 306; accord *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 740.)

The Courts of Appeal have held that a "proposed project" under environmental review is a reasonably foreseeable future project. (*Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 630; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 72-77; accord, Discussion foll. Guidelines, § 15130.) A project that is under environmental review is a "reasonably foreseeable probable future project" within the meaning of the Guidelines. (Guidelines, § 15355, subd. (b).) This is because once review is begun, a significant investment of time, money, and planning has probably occurred. Thus, once environmental review commences, the project is probable rather than merely possible. (*Friends of the Eel River v. Sonoma County Water Agency, supra,* 108 Cal.App.4th at p. 870; *San Franciscans for Reasonable Growth v. City and County of San Francisco, supra,* 151 Cal.App.3d at pp. 74-75.) It is an abuse of discretion to fail to include projects under environmental review if the omission will cause the severity and significance of the impacts to be gravely

understated. (*San Franciscans for Reasonable Growth v. City and County of San Francisco*, *supra*, 151 Cal.App.3d at pp. 77-78 [nearly 60 percent of total related development omitted]; accord *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 721 [omission of facts relevant to effects on air quality of project and other pollution sources].)

Plaintiff asserts the city ignored the cumulative impacts of a medical center planned for an adjacent parcel. Plaintiff contends city planning staff met with representatives of the medical center project on December 15, 2003. According to plaintiff, this was one month after the present project's draft environmental impact report was circulated for public comment. This was one month before the public comment period ended. Also, plaintiff argues the medical center project was presented to the city planning commission one month before the supplemental draft environmental impact report for the present project was circulated.

We find substantial evidence in the administrative record supported the city's conclusion the medical center project was not a reasonably foreseeable probable future project. Hence, the city was not obligated to consider the impact of the proposed medical center. The proposed medical center project first came to light after the draft environmental impact report for the present project had been circulated. There was no evidence the medical center project was subsequently under environmental review. The city could reasonably conclude the project had not reached a point that would transform it from a possible to a probable project.

Plaintiff argues further that a neighboring seven-story building, the Sterling Office Building, should have been included in the cumulative impact analysis because it might one day be occupied. The Sterling Office Building had no on-site parking facilities and had been largely vacant for a number of years. There was no non-speculative evidence in the administrative record to support an argument the building would fill with tenants in the future and its potential impact should therefore be studied. Pure speculation that the building might one day be occupied does not amount to a reasonably foreseeable

probable future project. Therefore, the city did not abuse its discretion in failing to consider the cumulative impact of the Sterling Office Building in conjunction with the environmental effects of the current project.

C. Traffic Analysis

Plaintiff argues the traffic analysis in the environmental impact report was distorted because of deficiencies in the underlying data. We find no prejudicial abuse of discretion. In its opening brief, plaintiff undertakes "a detailed analysis" of the traffic data in the environmental impact report. Plaintiff argues the city's analysis misled the public as to the true traffic impacts of the project. As the Court of Appeal has held, "Challenges to the scope of the analysis, the methodology for studying an impact, and the reliability or accuracy of the data present factual issues, so such challenges must be rejected if substantial evidence supports the agency's decision as to those matters and the [environmental impact report] is not clearly inadequate or unsupported (*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1620; 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 1999) § 12.5, pp. 464-465), unless the agency applied an erroneous legal standard (*Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143-1144)." (*Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259; accord, *Bakersfield Citizens for Local Control v. City of Bakersfield, supra,* 124 Cal.App.4th at p. 1198.) Here, the administrative record demonstrates that the city undertook an extensive analysis of the traffic impacts of the project. The data and analysis in the record support the city's traffic impact conclusions. Hence, there was no prejudicial abuse of discretion.

Plaintiff's reliance on *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783, 796, is misplaced. There the county relied on a traffic analysis methodology other than the one required by the county's general plan. There is no evidence here that the city's general plan required a certain methodology or that the required analysis was not used.

D. General Plan Amendment

Plaintiff asserts the city abused its discretion because: the effect of a general plan amendment was misrepresented; the environmental impact report did not analyze the general plan amendment's impact; and the specific plan for the project exceeded the maximum density and maximum height provisions of the general plan. Plaintiff's argument is unclear. Plaintiff's concern appears to be that by approving a specific plan allowing greater density, the city has set an undesirable environmental precedent. Plaintiff argues the project's deviation from existing height and density limits will set an environmentally deleterious precedent for future projects to exceed height and density restrictions. We conclude the argument is without merit.

The city's general plan provided for certain "anchor locations" that could be developed to a higher intensity of use than otherwise permitted. The city found the project site qualified as an anchor location. As noted above, the city adopted the specific plan governing the project. The city found the project was consistent with and furthered the goals of the general plan. The administrative record does not support plaintiff's assertion the need for these steps have been hidden from the public. In addition, there was no need for the city to independently analyze adoption of the specific plan in the environmental impact report. The whole purpose of the environmental impact report was to study the environmental effects of the proposed project which was the subject of the specific plan. We find no prejudicial abuse of discretion.

E. Air Quality Impacts

Plaintiff apparently contends: the environmental impact report did not consider the human health effects of identified short-term but significant air emissions impacts resulting from excavation and hauling associated with construction; the city did not

consider or disclose to the public that the chosen alternative called for expanded excavation, hence additional air quality impacts; and these omissions are compounded by the city's failure to consider the adjacent medical center project. Guidelines section 15126.2, subdivision (a), requires that an environmental impact report discuss "health and safety problems caused by the physical changes" a project will precipitate. (*Bakersfield Citizens for Local Control v. City of Bakersfield, supra*, 124 Cal.App.4th at p. 1219; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1123.) However, plaintiff does not cite to the air quality analysis in the environmental impact report. Under these circumstances, we may consider plaintiff's contentions waived. As the Court of Appeal held in *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 251, "[We are not required to] undertake a broad search of the extensive administrative record to seek out alleged error. At the appellate stage of these proceedings, it is [appellant's] burden to demonstrate in what particular respect [the city] lacked substantive evidence to support its findings. This court need examine the record only to the extent specific challenges to its sufficiency are raised. 'The rule is well established that a reviewing court must presume that the record contains evidence to support every finding of fact, and an appellant who contends that some particular finding it not supported is required to set forth in his brief a summary of the material evidence upon that issue. Unless this is done, the error assigned is deemed to be waived. [Citation.] It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings.' (*McCosker v. McCosker* (1954) 122 Cal.App.2d 498, 500.)" (Fns. omitted.) In any event, the record does not support plaintiff's claim the city failed to identify and analyze the human health effects associated with the planned construction. The health risks associated with grading, excavation and hauling activities were identified and analyzed. Separate health risk assessments were prepared for the project alternatives calling for expanded excavation. The city acknowledged a cancer risk but concluded the increased cancer risk would be scientifically insignificant given the limited duration of the

exposure. The city further found the project's economic, social and other benefits outweighed the significant and unavoidable impacts identified in the environmental impact report.

IV. DISPOSITION

The judgment is affirmed. Defendants, the City of Beverly Hills, the City Council of the City of Beverly Hills, and the Parking Authority of the City of Beverly Hills, and real parties in interest, Beverly Hills Luxury Hotel LLC and Athens Beverly Hills LLC, are to recover their costs on appeal from plaintiff, Beverly Hills Residential-Business Alliance for a Livable Community.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.